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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 653

W. DALTON LARUE, SR. and JUANITA S. LARUE,
Petitioners,

v.

STEWART L. UDALL, individually and as Secretary of the Interior, and NORTH AMERICAN AVIATION, INC.,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents distort the meaning of the Taylor Grazing Act, the intent of Congress and the nature and significance of the private land exchange here challenged. This Reply is particularly prompted by the fact that, in our view, the Solicitor General, inadvertently, may have been less than candid with the Court.

ARGUMENT

1. The Solicitor can hardly be serious in suggesting (Brief, p. 7), that the scope of authority which Congress intended to confer upon the Secretary in enacting Section 8b must be determined without even a glance at Congressional public land policy. He brands as "irrelevant" the historical reluctance of Congress to sanction broad disposals of the public domain, as evidenced both by statutes adopted and proposals unsuccessfully pressed upon it.

In dismissing this evidence of the Congressional will, which appears to be painfully relevant, the Solicitor seeks to distinguish this case since it involves a land exchange and not a sale or withdrawal. Whether public land is sold for cash at fair market value or exchanged for land of equal monetary value is hardly a meaningful distinction; the fact is that public land is being disposed of. The Interior Department, more candid in seeking legislation than as respondent before this Court, has freely acknowledged that it seeks to dispose of public domain to national defense industries and has chosen the private land exchange as a "roundabout" method of effecting a disposition for which it lacks, and to date has been denied, direct statutory authority (Petition, p. 13).[1] In seeking new legislation, including the amendment of Section 8b,

[1] Assistant Secretary Carver recently advised Congress that industrial firms whose activities are defense oriented have been compelled to "resort" to the exchange procedure as a "protracted and tortuous alternative" since existing laws present "formidable, if not impossible obstacles" (See Hearings before a Subcommittee of the House Committee on Interior and Insular Affairs, *Public Lands Review*, Ser. 11, Part 1—*Use and Disposal of Public Lands*, at page 10).

the Interior Department recognizes that it seeks authority to dispose of the public domain more freely. The method chosen does not change the fact that land is to be disposed of.

Neither respondent even attempts to grapple with the fact that Congress has specifically required that its prior approval be obtained and that compensation for lost grazing rights be paid when public lands are temporarily withdrawn from grazing districts because of a need by governmental agencies or their contractors to utilize these lands for national defense purposes (43 U.S.C. 315q; 43 U.S.C. 156). These facts are not consistent with the Secretary's declaration that Congress has given him *carte blanche* to alienate the public domain to private parties for similar purposes via the exchange route.

The meaning of the term "public interests" in Section 8 of the Act presents a fundamental question as to nature and scope of a Congressional grant of authority. Such questions are for the Courts to resolve, particularly when the issue presented is the scope of an agency's jurisdiction. *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130-31 (1944); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). The Government's reliance on *Unemployment Compensation Commission* v. *Aragan*, 329 U.S. 143 (1946) is misplaced. This case does not involve the specific application of a broad statutory term to a particular fact situation. The Secretary is not asked here to give a "practical administrative construction" to a quasi-technical term which can best be made by bureau specialists in the "usual administrative routine." *Gray* v. *Powell*, 314 U.S. 402, 411-12 (1941); *Power Reaction Development Co.* v. *International Union of*

Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1961).

Both the Government and North American urge that the Secretary has plenary power to exchange lands under Section 8b because the authority given him by Section 8a to accept gifts for the benefit of the Government is supposedly more circumscribed. Neither respondent attempts to come to terms with Judge Bazelon's cogent treatment of that contention.[2]

2. The Government argues that petitioners lack such an interest as would entitle them to a hearing since Congress allegedly (a) has provided for merely a temporary commitment of the public domain to grazing "pending its final disposal" and (b) has given the Secretary plenary authority to reclassify lands more valuable for any other use (Brief, pp. 8-9).

Surely the Solicitor must know that the phrase "final disposal" in Section 1 of the Act refers to the ultimate

[2] "The Secretary argues that where Congress wished to consider only grazing interests, it said so. For this proposition, he cites § 8(a), dealing with the acceptance of gift lands, which requires the specific showing that the acquisition will "promote the purposes of" a district or facilitate the administration of the public lands." But I do not think the more general language in § 8(b) was intended to allow the Secretary to go beyond grazing interests for his standards. Rather, it indicates that in an exchange of lands, there will be more than one factor to consider under the heading of grazing interests. Thus where the Government is conveying land as well as receiving land, it must consider the effect of the transaction not only on administration of the grazing district of the offered land, but also its effect on administration of the grazing district of the selected land and on the interests of grazing licensees of the land to be conveyed. [footnote reference omitted]. While offered land might meet the required standards, the detriment involved in giving up the selected lands might outweigh the benefit." (Excerpt from concurring opinion of chief Judge Bazelon, Petition, pp. 31a-32a).

disposition of the public lands *by Congress to the States*, an ultimate objective long sought by members of Congress from Western states. *See 78 Cong. Rec. 11145-46 (1934) and particularly the remarks of Senator O'Mahoney.* The phrase hardly indicates that the Secretary is authorized to grant temporary grazing rights before *he* proceeds to effect a far-reaching ultimate disposition of the public domain to private parties. Indeed, both the House and Senate Reports made it clear that the Taylor Act makes *no* disposition of the public domain (Petition, p. 9).

Nor does the reclassification authority granted in Section 7 provide any justification for the Secretary's alienation of the public domain. That provision provides for reclassifications as a condition precedent "*for disposal* in accordance with such classification *under applicable public-land laws.*" (emphasis supplied) Here, there is no public land law other than Section 8b the provision invoked by the Secretary—which would provide a basis for the attempted exchange. *Red Canyon Sheep Company* v. *Ickes*, 98 F. 2d 308, 324 (D.C. Cir., 1938).

The Solicitor is puzzled that petitioners claim the protections of due process while conceding that they are not constitutionally entitled to just compensation for the loss of grazing rights. That the due process and just compensation provisions of the Fifth Amendment constitute separate and different protections should come as no surprise. *Cf. Grahams Case*, 2 Ct. Cl. 327 (1866). The Courts have long held that the Government may not violate due process and fundamental principles of fairness in withdrawing a privilege or license bestowed by it which permits the conduct of private economic activity. (e.g. *see* Petition,

pp. 17-18). That conclusion has been reached despite the obvious fact that such a license or privilege is not guarded by the just compensation clause.

The need for an evidentiary hearing is underscored by North American's sharply conflicting Counter-Statement of the case. Moreover, the protections of an APA type hearing[3] conducted by an independent examiner are particularly necessary in a case such as this where the responsible administrative officials have been subjected to an extraordinary and overwhelming barrage of communications from political figures seeking approval of the North American's exchange applications (See J.A. 211-15).

Contrary to North American's assertion (Brief, p. 7), the "private" administrative file from which petitioners were denied access consisted not only of allegedly privileged intra-bureau memoranda but also of memoranda concerning *ex parte* conversations with North American (J.A. 187). Petitioners were told that further requests for access to such material would be considered provided their request "discloses the manner in which those documents would be relevant to the interest of your clients." (J.A. 187). This condition amounted to an effective denial of disclosure as petitioners obviously were unable to specify the relevancy of documents whose nature and contents were unknown. This bar to disclosure was unsuccessfully appealed to the Secretary (J.A. 231-32).

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[3] The Government's contention notwithstanding (Brief, p. 8), the procedures specified by the Administrative Procedure Act must be followed when due process requires that a hearing be held whether or not a hearing is specified by the particular statute authorizing the agency action. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950); *Kiss & Co.* v. *U.S.*, 341 U.S. 907 (1954).

3. Respondents suggest that petitioners' contention that Section 3 of the Act bars the revocation of their grazing licenses while their grazing unit is pledged was not raised before the Secretary. That is not true, and the Court of Appeals rejected respondents' argument in treating the merits.

In urging the Interior Department to afford them a hearing, petitioners did point to the requirements of Section 3. That petitioners' grazing unit is pledged as security for bona fide loans and that such security will be impaired by the revocation of their grazing license stands admitted. The issue here is solely one of law as to the meaning and scope of Section 3. No further determinations of an administrative nature are required, and the matter stands ripe for adjudication. *Hormel* v. *Helvering*, 312 U.S. 552, 556-59 (1941).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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